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In the Supreme Court of the United States

October Term 1971

No. 71-3366

BERTRAM YACHT SALES, INC.,
a Florida corporation,

Petitioner,

vs.

JULIO CESAR MORON, WALTER NEVILLE DRURY and all other Underwriters at LLOYDS OF LONDON subscribing to policy of insurance evidenced by C. A. Hansen Corporation Cover Note No. 1361 and EDINBURGH ASSURANCE CO., LTD. and all other British Companies subscribing to policy of insurance evidenced by C. A. Hansen Corporation Cover Note No. 1361,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTORY PARAGRAPH

Respondents, JULIO CESAR MORON, et al, submit this their Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Florida in Admiralty are appended hereto as Appendix "A", infra. The Order of the United States District Court Amending Findings of Fact and Conclusions of Law is appended hereto as Appendix "B", infra. The Opinion of the United States Court of Appeals is appended hereto as Appendix "C", infra. The Order of the United States Court of Appeals for the Fifth Circuit denying the Petition for Rehearing is appended hereto as Appendix "D", infra. The material portion of the Pretrial Stipulation entered into between the parties is appended hereto as Appendix "E", infra.

QUESTIONS PRESENTED BY PETITIONER

1. Whether the Findings of Fact and Conclusions of Law and Final Judgment of the trial court, affirmed by the United States Court of Appeals for the Fifth Circuit, was correct in finding Petitioner liable for alleged acts of negligence to the Respondent, the purchaser of a yacht from the Petitioner for damages caused to the yacht after delivery, as a result of a fire which the trial court found was of unknown origin.

2. Whether the Findings of Fact and Conclusions of Law and Final Judgment of the United States District Court in a negligence action tried in Admiralty and affirmed by the Court of Appeals is contrary to the decisions of the Supreme Court of the United States, the United States Courts of Appeal, and the Florida Supreme Court.

3. Whether the Final Judgment of the trial court, affirmed by the United States Court of Appeals for the Fifth Circuit, represents an unconstitutional taking of the Petitioners' property without due process of law in violation of the constitutional rights of the Petitioner in that a Final Judgment was entered, in an action which alleged acts of negligence, against Petitioner; holding the Petitioner liable for damages which were occasioned to the said yacht in the sum of $124,800.00 with the findings of the lower Court reflecting that the fire for which the damages were allowed was of an unknown origin.

4. Whether the Findings of Fact and Conclusions of Law of the United States District Court, affirmed by the United States Court of Appeals, constitutes such a radical departure from the accepted and usual course of judicial proceedings and has so far departed from the accepted usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-

ment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT

Respondents respectfully except to Petitioners' "Statement". A review of the record, which has not been presented to the Court by Petitioner, would show that the claim of liability is two fold: for breach of warranty and for negligence. This was so stipulated to by counsel for both Petitioner and Respondents in the Pretrial Stipulation. (Material portions appended hereto as Appendix "E", infra.)

The Trial Court specifically found that the Petitioner was negligent in the inspection it made of the vessel prior to delivery to Respondent MORON; that Petitioner, through its employee, which it sent to Venezuela, was guilty of negligence as said employee:

> "did take it upon himself on behalf of Bertram to inspect the vessel. He inspected it and he testifies very clearly about the deficiencies that he found in the vessel among which—not to exclude the others, but which he testified very clearly

that he was personally made aware from his own observations of the large amounts of salt water that had come down the raceways, had actually penetrated the panels, the electrical panels, the switchboard, the engine rooms, the ship-to-shore radio. As he explained it, some of these conduits stopped at the main helm in the cabin, others went directly to the engine room, went into the main switch panel, what I would call the central electrical system of the vessel.

He describes them as being literally incrusted in salt.

Now, I think once this was known to the Defendant, since they had apparently felt the obligation, and I think rightly so, they had several alternatives. I think they could have taken it upon themselves to repair it. Mr. Hazelwood (Petitioner's employee) went out and hired two employees to make repairs on the vessel. He describes these men as carpenters, and he describes the area they worked on.

Frankly, I think the areas they worked on were serious, but I don't think they were as serious and they were certainly no more serious than the electrical situation. Yet, he did not hire anyone or seek to hire anyone to make what appears to me, at least, as a fact-finder, what had to be done to correct the situation in the electrical system. He did report this to Bertram. He apparently reported the excessive amount of salt water that had penetrated the electrical system.

It is true that he made Ron Vickers (the Hatteras employee who was present in Venezuela) aware of this. It is true that he solicited Ron Vickers' help and it is also true that apparently Vickers took some action in this regard and actually ordered some replacement parts for the electrical panel and other electrical parts of the vessel.

I don't think Bertram can say to this plaintiff the responsibility is that of Hatteras. App. 4-5, infra, explanation added.)

. . . .

I think as between this plaintiff and this defendant, this defendant was negligent in not seeing that the electrical system was properly repaired, and it may have well required and entire rewiring of this vessel, and I would not find that unreasonable under these circumstances.

This was a substantial vessel. The only way I could describe it is a luxury yacht, costing a substantial sum of money. I think any time someone puts $180,000 or $190,000 or whether it is $150,000 in a vessel, they certainly have a right to expect that they are going to get a motor vessel that is seaworthy.

It is my finding that this vessel was about as unseaworthy as any vessel could be because of these defects.

> Now, I think the defendant Bertram had an obligation to either repair this, and, of course, they could have and they probably would have, as they did in the other situation, have passed that cost along to the manufacturer.
>
> As between Bertram and this plaintiff, I think they had an obligation to do that or, secondly, if they didn't want to do that, and, frankly, I think they should have, once they became aware of this and once they knew the situation existed, they certainly had an obligation to at least advise the plaintiff of the extensive nature of the salt incrustation of this electrical system. (App. 5-6, infra.)

The basis for the Petitioner's argument in its effort to convince the Court that it should entertain this case is basically the same argument presented by Petitioner to the United States Court of Appeals for the Fifth Circuit and found to be without merit by that Court.

REASONS FOR DENYING THE WRIT

It is Respondents' position that the subject judgment is not in conflict with the Opinion of the United States Court of Appeals for the Fifth Circuit in an analogous Admiralty action involving a fire on board a yacht as urged by Petitioner (**Rooney v. Nuta**, et al, 267 F.2d, 142).

In essence, Petitioner's argument is predicated upon two statements made by the trial Judge when rendering his decision at the conclusion of this case. These are:

"I will also state candidly in the record that I cannot point to where this fire started. The plaintiff has not established by a preponderance of the evidence in what part of this vessel this fire started. (App. 7, infra).

I think this fire was a direct result of one, two, maybe a whole series of short circuits in the electrical system." (App. 7, infra).

Petitioner is particularly critical of the latter.

However, Petitioner ignores the following statements made by the trial Judge as part of his decision:

"However, **the evidence is overwhelming** that this fire **undoubtedly** started because of the salt intrusion in the electrical system, the short circuits that had to result; and I don't think it would have made any difference whether they started in the main panel in the engine room or some wiring that lead to that panel, whether it be the battery charger or the bilge pumps or whatever.

There is **no question in my mind** that it started in the electrical system and there is **no doubt in my mind** that it spread through the electrical system." (App. 7, infra, emphasis added.)

The above quoted statements relied upon by Petitioner were made by the trial Judge immediately before and after the last quoted statements. To place the material findings by the trial Court in proper context, they read:

"I think this fire was a direct result of one, two, maybe a whole series of short circuits in the electrical system.

As I have stated before, I do not think the radio ground straps started this fire.

The plaintiff has, it is true, made its major thrust in that direction, and I reject that. It just doesn't make sense to me.

However, the evidence is overwhelming that this fire undoubtedly started because of the salt intrusion in the electrical system, the short circuits that had to result; and I don't think it would have made any difference whether they started in the main panel in the engine room or some wiring that lead to that panel, whether it be the battery charger or the bilge pumps or whatever.

There is no question in my mind that it started in the electrical system, and there is no doubt in my mind that it spread throughout the electrical system.

I will aslo state candidly in the record that I cannot point to where the fire started. The plaintiff has not established by a preponderance of the evidence in what part of this vessel this fire started. However, I do not think the law requires that. (App. 7, infra).

Thus, it can be seen that the Findings of the trial Court do not consist of "think" or "maybe" as urged by Petitioner but are clear and unequivocal.

It is respectfully urged that the decision of the Fifth Circuit in this case is not in conflict with that Court's decision in **Rooney v. Nuta**, et al, supra. In that case, a fire occurred aboard a vessel and the owner proceeded to petition for exoneration or limitation of liability. There were numerous claimants whose property had been damaged as a result of the fire which occurred in the boatyard. The primary testimony which was introduced by the claimants in order to avoid a finding in favor of the vessel owner on his plea for limitation was through an expert. There was fact testimony to the effect that the captain of the vessel was unable to maintain a charge on the vessel's batteries. He testified that this was due to the poor condition of the batteries. Claimants' expert was asked whether the recurring discharge of the batteries could cause a fire in the circuit and he answered, "It likely could, yes."

In referring to the expert's testimony, the Appellate Court stated, "That is the closest approach to an answer upon which the finding of the Court that the fire resulted from a defect in the electrical system could be based . . ." (at page 147). Other testimony which was introduced by the vessel owner was to the effect that, while there had been prior problems of another nature in the vessel's electrical system, these problems had been corrected by a shipyard before the fire. The trial Court's finding in favor of the claimants was reversed by the Appellate Court on the basis that the claimants' evidence was insufficient to support a finding that the fire was the result of the afore-mentioned condition.

In this case, we have specific findings by the trial Court of the existence of a number of defects in the vessel's electrical system, which defects has caused short circuits during the voyage from Miami to Venezuela; that the cause of these defects was due to the entry of sea-water into the vessel's electrical system; that instead of correcting these defects or, at least, warning MORON as to the existence thereof and not to use the vessel, Petitioner chose to leave the vessel in her corroded condition of which it had specific knowledge. These findings coupled with the last quoted findings by the Court logically lead to the conclusion that Bertram was negligent and that this negligence was the proximate result of the fire aboard the vessel.

Per force, "By the very nature of a fire, its cause must often be proven through a combination of common sense, circumstantial evidence, and expert testimony" (**Minerals and Chemicals Philipp Corporation, v. S.S National Trader**, etc., 2 Cir. 1971 445 F.2d 831, 834, with authorities cited).

In closing, Respondents would observe that Petitioner complains that the trial Court found that " . . . the fire was of unknown origin". (QUESTIONS PRESENTED BY PETITIONER, p.p. 2-3, supra). In fact, such was not the finding. Rather, the "origin" was specifically found to be short circuits within the defective electrical system. Petitioner does not really complain of the Court's ruling that the Respondents were not obligated, under the law, to prove specifically where the fire started aboard the vessel. Rather, Petitioner's complaint is that the decision by the Appellate Court in this case is contrary to that Court's decision in **Rooney v. Nuta**, supra. In fact, it is respect-

fully submitted to this Court that the two decisions are not in conflict in view of the substantive evidence which was introduced by Respondents which conclusively established that the origin of this fire was in the vessel's electrical system.

CONCLUSION

For the foregoing reasons, Respondents pray that a Writ of Certiorari should be denied.

Respectfully submitted,

JULIO CESAR MORON, et al
Respondents

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APPENDIX

APPENDIX "A"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

AFTERNOON SESSION

Miami, Florida
September 22, 1971
3:30 p.m.

(The trial reconvened pursuant to recess, and the following proceedings were had:)

THE COURT:

Gentlemen, I don't have to tell you all, non-jury trials are no favorities to the Judge.

I have not had a chance to write this out in any formal fashion. However, I have reread the depositions we discussed, and I can tell you what my conclusions are with or without referring to the amended complaint.

Following it through, I think, step by step, it is my feeling that the plaintiff has not established by a preponderance of the evidence that the radio ground strap was the cause of this fire, either under the warranty count or the negligence count.

Further, as we discussed earlier, I do not believe the plaintiff has sued under a general vendor's warranty of

fitness, and I denied the motion to amend the pleadings because I do not think it would be prejudicial to the defendant at this point.

Frankly, if we didn't have the situation involving the manufacturer, I would have undoubtedly allowed the amendment, but I do think it would prejudice the defendant in this case under these facts.

Turning next to the negligence counts, I do not feel that the plaintiff has established by a preponderance of the evidence that under negligence the radio ground strap was the cause of the fire. Frankly, because I feel so strongly that the radio ground strap was not the cause of the fire, I find it completely unnecessary to determine whether or not it was negligently installed.

For the record, and so you will all understand it, there is no question the radio ground strap came in contact with the battery cable. There is no question about that.

But I just cannot find a fact-finder that that radio ground strap agitated sufficiently to go through that insulation on that battery cable or, if it did, that it generated enough heat to start the fire. I just think, if the evidence has a preponderance, it is the other way, that it couldn't have done it.

Now, I do think that leaves me with the general allegations of negligence against the defendant, and in that aspect I am finding for the plaintiff, and the basis of my ruling is this, and it does involve the manufacturer, and I will be glad to state in the record how it involves

the manufacturer as well, because I don't see how we can separate them, really, completely.

As a fact-finder, it is my opinion that this boat, when delivered from Hatteras to Bertram, had numerous defects. I think the most obvious and most serious defects were the way the flying bridge was attached above what I would call the main cabin top. This apparently left exposed the cable raceways that have been discussed.

There were also other leaks throughout the vessel. The windows were apparently in extremely poor shape; and there were other leaks in the vessel.

Now, turning to Bertram, the first theory I think we are dealing with, as a fact-finder I do find that Bertram was negligent in the inspection it made of the vessel prior to delivery to the plaintiff.

It is my feeling that a reasonably competent inspection and a reasonably competent sea test and some sort of inspection to determine whether or not, in fact, there were any leaks at the windows, the windshield, the flying bridge, the sealed areas, where the flying bridge is connected to the top of the cabin, certainly would have revealed these major deficiencies; and these were not minor leaks but these were major leaks, allowing large amounts of sea water to penetrate areas of the vessel that the water should have never been allowed near.

That is the first area where I feel Bertram was guilty of negligence, both acts of commission and omission, and I think they accepted this responsibility and performed it in a negligent fashion.

Now, the second area where I feel they were equally guilty of negligence is when the boat arrived in Venezuela, Mr. Hazelwood was sent down and did take it upon himself on behalf of Bertram to inspect the vessel. He inspected it and he testifies very clearly about the deficiencies which he found in the vessel, among which—not to exclude the others, but which he testified very clearly that he was personally made aware from his own observations of the large amounts of salt water that had come down the raceways, had actually penetrated the panels, the electrical panels, the switchboards, the engine rooms, the ship-to-shore radio. As he explained it, some of these conduits stopped at the main helm in the cabin, others went directly to the engine room, went into the main switch panel, what I would call the central electrical system of the vessel.

He describes them as being literally encrusted in salt.

Now, I think once that was known to the defendant, since they had apparently felt the obligation, and I think rightfully so, they had several alternatives. I think they could have taken it upon themselves to repair it. Mr. Hazelwood went out and hired two employees to make repairs on the vessel. He describes these men as carpenters, and he describes the areas they worked on.

Frankly, I think the areas they worked on were serious, but I don't think they were as serious and they were certainly no more serious than the electrical situation. Yet, he did not hire anyone or seek to hire anyone to make what appears to me, at least, as a fact-finder what had to be done to correct the situation in the electrical system. He did report this to Bertram. He apparently reported the

excessive amount of salt water that had penetrated the electrical system.

It is true that he made Ron Vickers aware of this. It is true that he solicited Ron Vickers' help and it is also true that apparently Vickers took some action in this regard and actually ordered some replacement parts for the electrical panel and other electrical parts of the vessel.

I don't think Bertram can say to this plaintiff the responsibility is that of Hatteras.

Now, as I mentioned earlier, they are not before me but, if they were, I am frank to say I would attribute all of this defective condition to the manufacturer. I think every defect that arose and I think the problems that were a direct result of the salt-water penetration all goes back to the defective manufacture of this vessel.

I think as between this plaintiff and this defendant, this defendant was negligent in not seeing that the electrical system was properly repaired, and it may have well required an entire rewiring of this vessel, and I would not find that unreasonable under these circumstances.

This was a substantial vessel. The only way I could describe it is a luxury yacht, costing a substantial sum of money. I think any time someone puts $180,000 or $190,000 or whether it is $150,000 in a vessel, they certainly have a right to expect that they are going to get a motor vessel that is seaworthy.

It is my finding that this vessel was about as unseaworthy as any vessel could be because of these defects.

Now, I think the defendant Bertram had an obligation to either repair this and, of course, they could have and they probably would have, as they did in the other situation, have passed that cost along to the manufacturer.

As between Bertram and this plaintiff, I think they had an obligation to do that or, secondly, if they didn't want to do that, and, frankly, I think they should have, once they became aware of this and once they knew the situation existed, they certainly had an obligation to at least advise the plaintiff of the extensive nature of the salt encrustation of this electrical system.

It doesn't make sense to me that they made a few minor repairs, took the boat out for a sea test and said, "Well, everything is working fine today, so that's it; we'll go back to the United States."

They certainly should have anticipated that any ship's electrical system that is salt-encrusted may work today but it certainly is not going to work tomorrow, and there is no way a reasonable person can anticipate that it is going to work next month, unless somebody does something to either remove the salt and then change the wiring or replace the wiring.

I think anyone with any expertise, even short of being an expert, anyone with any particular knowledge about boats and electrical systems, and certainly Mr. Hazelwood, although he is not an electrical expert, from his experience, from his position, from his competency in working with yachts, should have known the seriousness of the situation. I think it just required more action on his part than he took.

Now, that is the basis of my finding.

I think this fire was a direct result of one, two, maybe a whole series of short circuits in the electrical system.

As I have stated before, I do not think the radio ground straps started this fire.

The plaintiff has, it is true, made its major thrust in that direction, and I reject that. It just doesn't make sense to me.

However, the evidence is overwhelming that this fire undoubtedly started because of the salt intrusion in the electrical system, the short circuits that had to result; and I don't think it would have made any difference whether they started in the main panel in the engine room or some wiring that led to that panel, whether it be the battery charger or the bilge pumps or whatever.

There is no question in my mind that it started in the electrical system, and there is no doubt in my mind that it spread throughout the electrical system.

I will also state candidly in the record that I cannot point to where this fire started. The plaintiff has not established by a preponderance of the evidence in what part of this vessel this fire started. However, I do not think the law requires that.

I think this vessel was, as I say, completely unseaworthy, and I think it was almost a dangerous vessel, really, to even try to operate at that point.

I think the defendant was negligent in not either correcting the situation after they knew it or in at least warning the plaintiff that something had to be done, that he should not attempt to operate the vessel; probably should have warned him to disconnect all currents, not only the shore current but should have disconnected the batteries until some major repairs could be made to the electrical system.

Insofar as damages are concerned, I am going to award to the plaintiff the sum of $124,800. I think a reasonable period for the captain's salary would be four months, $450 a month, which would be $1,800.

The $123,000 I think is the best realistic estimate of the repairs that would have been required to return this vessel.

I have also considered whether or not the vessel was a constructive loss. I must say in all candor I feel it probably was, but if we term it a constructive loss and attempt to arrive at some reasonable depreciation, because it was undoubtedly a used vessel before the fire, although certainly a "slightly used vessel," if you allow some reasonable depreciation, I think you might very well end up with the same figure of roughly $123,000 or $150,000. I don't know how you can, you know, pin that down that definite.

The vessel was sold for $25,000. The plaintiff had undoubtedly incurred the costs of taking the vessel to South America.

There is some conflict about what the market value would have been. I think I understand Mr. Nagler's testi-

mony and I don't think Mr. Nagler was using the term market value as the plaintiff's attorney was; but there certainly is some gray area in there.

There is also testimony about the additional equipment that the plaintiff put on the vessel. I don't think it makes any difference whether I say the plaintiff had $180,000 in the vessel and I am allowing $30,000 or $32,000 depreciation, and then substracting the salvage value, or whether I use the figure of repairs.

I have tried to compute it both ways and I end up right in the same area.

I am stating in the record that for the purpose of returning the verdict, I would use the repair figure of $123,000 and add to it the four months of the captain's salary at $1,800.

I will be glad to enter final judgments accordingly.

I don't know whether I have answered all the questions that you all have. If there are any specific questions, I will be glad to try to answer them, if it will help either side.

MR. MARSTON:

Will what Your Honor just dictated serve as the Court's formal findings of fact and conclusions of law?

THE COURT:

It is all right with me, unless either side has some objection or wants to draw them up in a more formal form.

MR. MARSTON:

If I may ask this: I would like the court reporter to transcribe what Your Honor has just dictated, and I would like five days after receipt of the transcript to make any proposed revisions which I feel might be indicated.

THE COURT:

Fine.

I am sure that Mr. Batcheller will probably want to study it, too.

As I say, I will further state in the record that I regret frankly that the manufacturer was not here, and I will also candidly state in the record that I agree with Mr. Batcheller: There was no way he could have anticipated they should have been here, the way the major thrust of the lawsuit was.

For whatever it is worth, I hope that Bertram is not precluded from going against the manufacturer, because I think every defect in this boat arose from the manufacturing defects that started the chain, so to speak. I do believe that as between this plaintiff and this defendant, that the defendant had the obligations I have discussed.

I must say that certainly the plaintiff was in the unfortunate position of having an accident that was going somewhere to happen.

Thank you, gentlemen. I appreciate your cooperation.

MR. MARSTON:

Thank you very much, Your Honor. I am sorry the trial extended beyond our prognostication.

THE COURT:

Some do, some don't.

[Thereupon, the trial was concluded.]

CERTIFICATE

STATE OF FLORIDA)
: SS.
COUNTY OF DADE)

WE, SIDNEY ZOVLUCK and MARIO J. CONTILLO, Official Court Reporters, do hereby certify that the foregoing transcript, consisting of pages numbered from 1 to 609, inclusive, contains a true and correct transcription of our shorthand notes as taken by us of the proceedings before The Honorable PETER T. FAY, United States District Judge, at the time and place aforesaid.

DATED at Miami, Florida, this 22nd day of November, 1971.

s/ Sidney Zovluck
Official Court Reporter
s/ Mario J. Contillo
Official Court Reporter

APPENDIX "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

NO. 70-343-Civ-PF

JULIO CESAR MORON,

Plaintiff,

vs.

BERTRAM YACHT SALES, INC., et al.,

Defendants.

ORDER

THIS CAUSE having come before the Court upon the Motion And Supporting Memorandum of the Plaintiff to supplement the Findings and Conclusions of Law entered by the Court at the conclusions of the trial of this case in the following respects:

1. To add "The vessel's electrical system was ravaged by the fire." at the conclusion of the paragraph:

   "I will also state candidly in the record that I cannot point to where this fire started. However, I do not think the law requires that."

which appears on page 10 of the transcript of said Findings and Conclusions.

2. To add the phrase: " . . . into as good a condition as she was before the fire." at the end of the sentence which appears as the first full paragraph on page 11 of the transcript of said Findings and Concusions:

"The $123,000 I think is the best realistic estimate of the repairs that would have been required to return this vessel."

and the Court having reviewed same and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Findings and Conclusions entered by the Court at the conclusion of the trial of this case be, and they are hereby supplemented in the following respects:

1. By adding "The vessel's electrical system was ravaged by the fire." at the conclusion of the paragraph:

"I will also state candidly in the record that I cannot point to where the fire started. However, I do not think the law requires that."

which appears on page 10 of the transcript of said Findings and Conclusions.

2. By adding the phrase: " . . . into as good a condition as she was before the fire." at the end of the sentence which appears as the first full paragraph on page 11 of the transcript of said Findings and Conclusions:

"The $123,000 I think is the best realistic estimate of the repairs that would have been required to return this vessel."

DONE AND ORDERED at Miami, Dade County, Florida this 7th day of October, 1971.

/s/ Peter T. Fay
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-3366
Summary Calendar*

JULIO CESAR MORON, ET AL.,
Plaintiffs-Appellees,

versus

BERTRAM YACHT SALES, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

---

(April 20, 1972)

Before GEWIN, AINSWORTH and SIMPSON Circuit Judges.

PER CURIAM: Julio Cesar Moron, a citizen of Venezuela, and his Lloyds of London insurance underwriters (Moron), brought suit in the district court against Bertram Yacht Sales, Inc., (Bertram) a Florida corpora-

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*Rule 18, 5 Cir.; *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

tion, to recover for damages suffered by a yacht, (purchased from Bertram by Moron), in a fire while the vessel was moored in its Venezuelan home port. Following a non-jury trial, the court below entered judgment for Moron in the amount of $124,000.00. Bertram has appealed to this Court, contending that the district court's findings of fact were speculative, conjectural, not supported by the evidence, and clearly erroneous. We affirm.

On June 10, 1968, Bertram sold a fifty foot Hatteras twin-screw Diesel yacht, manufactured by the Hatteras Yacht Company of North Carolina, to Moron for a purchase price in excess of $150,000.00. Before making the sale, Bertram's employees inspected the vessel and found it to be in good condition. Moron and his crew subsequently took the yacht to Venezuela. During the course of this voyage it became necessary for the vessel to put into port at Puerto Rico where substantial warranty repairs were accomplished.

Following the vessel's arrival at its home port in Venezuela, Moron notified Bertram and the Hatteras Yacht Company of the need for additional warranty repairs. Bertram dispatched its employee Hazelwood and Hatteras sent its employee Vickers to Venuezuela for further warranty work. The repairs were made by Vickers. Before and after the repairs were made, Hazelwood inspected the vessel, at which time he observed substantial salt-water intrusion into the compartment containing the vessel's electrical system. Before leaving Venezuela, Vickers and Hazelwood took the yacht on a two-hour sea trial, after which Hazelwood pronounced the vessel in good condition. Hazelwood did not advise Moron that the vessel was leaking and that the electrical

system had been damaged by salt water. The repairs which Vickers had performed were not related to these conditions.

The yacht burned at its mooring n September 26, 1968. The fire appears to have originated in the electrical system. At trial, Moron pursued the theory that Bertram's employees had negligently installed a radio ground strap in the bilge of the vessel, thereby permitting a short-circuit to occur. In addition to this particularized theory, Moron contended that the yacht, in general, was unseaworthy.

At the conclusion of the trial, the district judge rendered his findings of fact and conclusions of law orally from the bench. The trial judge disclaimed any knowledge of the precise location of the fire's origin and found that the radio ground strap was not the cause of the blaze. He went on to find that the yacht was full of leaks and that substantial salt-water intrusion had taken place throughout the electrical system between the time Moron took delivery of he yacht and the time Vickers and Hazelwood traveled to Venezuela. The trial judge further determined that Hazelwood was under a duty to warn Moron of the yacht's dangerous condition, that the leaks and salt-water intrusion proximately caused the fire which damaged the vessel, and that the vesel, prior to the fire, was unseaworthy. On the basis of these findings, the district judge concluded that Hazelwood, and his employer, had been negligent in failing to discover the leaks prior to the sale to Moron and in failing to warn Moron of the danger during the course of Hazelwood's visit to Venezuela.

On this appeal, Bertram does not claim that it was taken by surprise and not permitted o meet the theory based upon salt-water damage to the electrical system. Bertram's appeal is limited to an attack upon the accuracy of the district court's findings of fact. Moron, of course, is perfectly content to rely upon the theory embraced by the court below.

After carefully reviewing the record and briefs in this case, we are unable to conclude that the district court's findings of fact are "clearly erroneous" within the meaning of Rule 52(a), Federal Rules of Civil Procedure. See McAllister v. United States, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20. The judgment of the district court is

AFFIRMED.

APPENDIX "D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3366

JULIO CESAR MORON, ET AL.,
Plaintiffs-Appellees,

versus

BERTRAM YACHT SALES, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Apr. 20, 1972, 5 Cir., 1972. ____ F.2o ____).

(May 25, 1972)

Before GEWIN, AINSWORTH* and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nar Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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*Judge Ainsworth took no part in the consideration and decision of the Petition for Rehearing and for Rehearing en banc.

APPENDIX "E"

7. Issues of fact:

Plaintiff's contentions:

The Plaintiff's claims are based upon an alleged breach of warranty by the Defendant and/or the Defendant's negligence in either creating, failing to remedy and/or in failing to inform the Plaintiff of the condition or conditions which caused the fire aboard the vessel. In particular, Plaintiff urges liability based upon the manner in which the radio ground strap was installed or positioned in the area aboard the vessel between the deck and bottom of the bilge. The strap was installed by Radiomarine Communications of Florida, Inc., the added defendant, pursuant to agreement between that company and the Defendant. Following installation of the radio equipment and the strap the vessel was delivered to the Plaintiff by the Defendant in Miami, Florida and the vessel departed for Venezuela. Delivery took place in June, 1968. Following the vessel's arrival in Venezuela Defendant sent one of its employees to the vessel for the purpose of carrying out extensive repairs and corrections and this work was accomplished in July, 1968.

The Defendant's employee discovered that a good many electrical problems existed aboard the vessel due to the entry of sea water into the vessel's electrical system. The main cause of this entry appeared to be due to presence of holes on the deck of the vessel's flying bridge which was situated so as to permit any water which came onto the bridge to enter the electrical system. The vessel encountered adverse weather on the voyage from

Miami to Venezuela. A substantial amount of work was done on the vessel by the Defendant's employee in Venezuela in July, 1968 and this included certain work on the electrical system as a result of the intrusion of sea water. Specifically, this work included repair and/or replacement of certain electrical outlets, repair and/or replacement of various items composing the vessel's electrical panel, replacement of the vessel's bilge pumps, work on the vessel's radio system and/or perhaps a refastening of the battery cables in the area where the radio ground strap was located, below deck.

Various surveyors examined the vessel following the fire in September, 1968 and concluded that a cause of the fire was contact between the radio grounding strap and one or both of the battery cables located immediately next to the strap. The surveyors opined that the edge of the metal ground strap had come in contact with the cable or cables which resulted in an electrical short and the subject fire.

The Plaintiff's claim against the Defendant is that it breached its vendors warranty of fitness because the strap was installed in such a manner so as to come in contact with the cables and/or that the work carried out by the Defendant's employee in Venezuela was not properly performed so as to give rise to the condition which caused the fire and/or that the Defendant's employee failed to discover conditions which resulted in the fire and/or that the Defendant, through its agents, servants or employees failed to advise the Plaintiff of the conditions which the Defendant failed to correct when these persons knew or should have known that these conditions constituted a danger to the safety of the vessel.

As a result of the fire Plaintiff alleges that the vessel was a constructive total loss that is that the cost of arranging for and effecting the repair of the damage sustained by the vessel less her residual value following the fire exceeded the fair market value of the vessel, her engines, tackle, equipment and appurtenances immediately prior to the casualty. Further, that the Plaintiff is entitled to the fair market value of the vessel, including the value of her engines, tackle, equipment and appurtenances plus certain expenses incurred by the Plaintiff as a result of the casualty less the value of the vessel immediately following the casualty.